

On June 8, 2005, the parties appeared before Judge Benedict for a second preliminary hearing. At that hearing, claimant presented a copy of a letter or written statement from Doris Shopteese, which claimant contends establishes that respondent had timely notice of the alleged September 2004 accident. On the basis of that letter, Judge Benedict held in the June 10, 2005, Order that respondent had timely notice of claimant's alleged September 2004 accident. The Judge also specifically held that claimant sustained an accident that arose out of and in the course of claimant's employment with respondent.

Respondent contends Judge Benedict erred. Respondent argues claimant has failed to prove he injured his right arm or shoulder in a work-related accident that occurred in Kansas. In addition, respondent argues claimant failed to provide it with timely notice of the alleged September 2004 accident. Accordingly, respondent requests the Board to reverse the June 10, 2005, Order and to deny claimant's request for benefits.

Conversely, claimant contends the June 10, 2005, Order should be affirmed.

The issues before the Board on this appeal are:

1. Did claimant sustain personal injury by accident in September 2004 that arose out of and in the course of his employment with respondent?
2. If so, did respondent have timely notice, as required by K.S.A. 44-520, of the alleged September 2004 accident or alleged resulting injury?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes the June 10, 2005, Order should be reversed.

This Board, in its Order dated April 28, 2005, determined claimant failed to provide respondent with timely notice that he had injured his right arm or shoulder in an alleged September 2004 accident in Kansas. The Board did not address whether claimant sustained personal injury by accident arising out of and in the course of his employment with respondent. In its April 28, 2005, Order, the Board set forth this claim's somewhat unusual facts, which may be summarized as follows:

Claimant was employed as an over-the-road truck driver. Respondent's home base is in Virginia and claimant began his last load for respondent from New Jersey. When he delivered the goods to a customer in Chicago, Illinois, on August 30, 2004, claimant testified that he hurt his right shoulder. He did not contact his employer at that time and continued on his route.

Then, on September 4, 2004, claimant arrived in Hiawatha, Kansas. As he was at the end of his driving day, he elected to spend the night with a friend, Doris Shopteese. According to claimant, he was getting out of his truck at Ms. Shopteese's home, when he slipped and fell to the ground. He claims he hit his head and neck and landed on his right shoulder. He did not contact his employer at that time. The same day, claimant went to the emergency room in Topeka, Kansas and sought treatment for shoulder complaints. The medical record from this visit reflects a diagnosis of shoulder pain and does not include any history of injury. Claimant was referred to a local orthopaedic physician for follow-up.

After visiting the emergency room, he waited a few days then contacted Chris Widener, his dispatcher, in Virginia on September 7, 2004. According to claimant, he told Mr. Widener of his injury and was referred to Stan Farhy. Claimant then called Mr. Farhy and told him of his injury. Claimant cannot recall precisely what he told Mr. Farhy. He generally recalls telling him of the events that occurred in Chicago, Illinois, explaining the right shoulder injury, but he doesn't recall whether he told Mr. Farhy about the fall from his truck in Hiawatha, Kansas. [Footnote citing P.H. Trans. [(Jan. 19, 2005)] at 24-25]. He only remembers telling Mr. Farhy that he was injured.

Both Chris Widener and Stan Farhy testified by deposition. Mr. Widener testified that claimant called in on September 7, 2004, and informed him that he had been hurt on August 30, 2004 while in Chicago. Mr. Widener asked claimant why he was just now informing him of this incident, and claimant told him that it wasn't giving him problems. At no time during this conversation did claimant disclose an accidental injury in Hiawatha, Kansas.

Mr. Farhy testified that claimant called him on September 7, 2004. He indicated that claimant told him that while he was picking up a load in Chicago on August 30th and preparing to leave he had to climb up and pull a roll bar down, and as he was doing that he slipped and pulled him *[sic]* arm out of joint. [Footnote citing Farhy Depo. at 5]. Claimant informed Mr. Farhy he had already been seen by a doctor. According to Mr. Farhy, claimant did not mention any accident in Hiawatha, Kansas on September 4, 2004.

. . . .

On September 8, 2004, claimant was seen by Dr. Kenneth Teter. Dr. Teter's record indicates claimant's shoulder injury occurred when claimant "fell out of the back of a trailer on 8-27-04" when claimant "caught himself with his right arm extended." [Footnote citing [P.H. Trans. (Jan. 19, 2005)], Resp. Ex. A]. There is no mention in this record of any accident or fall on September 4, 2004.

Around September 10th, Doris Shopteese contacted Mr. Farhy and told him that claimant's accident did not happen as he says. She indicated that claimant was trying to file a false workers compensation claim and asked her to lie about where he was injured. This sparked Mr. Farhy to turn this information over to the insurance company for an investigation.

In Ms. Shopteese's deposition she relayed her version of how claimant was injured:

A. He [claimant] pulled in the drive, got out of the truck, came into the house to check to see what I was cooking, commented that the pork chops looked very well, and he said that they looked very

professional. And I asked him, Did you get my cigarettes? And he said, Oh, yes, I did, let me go out and go get them. So he went back out to get them. And I turned the fire down.

As I was walking back to the living room – or the dining room, I peeked out the window, and I seen Jim [claimant] on the steps of the truck with a sack in his hand which had the cigarettes in them, and he was shaking back and forth saying, Whoa, baby, I'm happy to be home.

Q. Okay. What happened after that?

A. He fell off the top of the step.

Q. He fell off of his truck?

A. Yeah. He was on the top step with the door shut.

Q. And this was after he had already arrived, been in the house and had gone back to the truck; is that correct?

A. Yes.

Q. Okay. Did he mention anything about hurting himself when he fell from the truck?

A. I ran out and checked on him, and he was covered with rocks and pebbles, because my driveway is rocks, and I brushed them off from him, and I asked him if he was okay. And he said that his shoulder was kind of hurting but that it would be okay. [Footnote citing Shopteese Depo. at 5-7].

Ms. Shopteese stated that she went out, and helped claimant up, and suggested that he see a doctor, but claimant would not go. She indicated that claimant told her if his job ever called her she was to remember that he was hurt in Chicago. [Footnote citing *Id.* at 8]. Ms. Shopteese states her reason for calling Mr. Farhy was because claimant had been taking Demerol and then going out and driving his truck, and she was concerned that claimant should not be driving and wanted to check with his supervisor. It is clear from the record that claimant and Ms. Shopteese have had a parting of the ways and her motives may be less than altruistic. In fact, the claimant's landlord, Pama Bruce, testified that Ms. Shopteese has been the source of ongoing disturbances at the hotel where he has been residing.

Claimant was last seen by Dr. Kimball Stacey on December 23, 2004, at his lawyer's request. Dr. Stacey's report indicates claimant was injured on October 7, 2004 [Footnote: This appears to be an error. Claimant does not know why October is referenced as he maintains he told Dr. Stacey of the September 4, 2004 accident.] when he fell from the cab of his tractor trailer onto the ground. Claimant denied "any prior symptoms, injuries or accidents similar to those described" in his report. [Footnote citing P.H. Trans. [(Jan. 19, 2005)], Cl. Ex. 1, at 2]. Dr. Stacey's report indicates that immediately after the accident, claimant initially complained of severe pain in his neck and right shoulder, confusion and stiffness in his upper back. Dr. Stacey opined that claimant's injuries were due to his work-related accident. He recommended claimant have an MRI done for his right shoulder and that he see an orthopedic physician.

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Not surprisingly, claimant argues that the August 30, 2004 accident was inconsequential, and that it was the subsequent injury of September 4, 2004 that caused his significant right shoulder complaints as well as the plethora of other bodily complaints he now asserts. Claimant alleges it was the September 4, 2004 accident that arose out of and in the course of his employment that has given rise to his present need for treatment. The difficulty with this argument is that claimant repeatedly failed to mention the existence of the September 4, 2004 accident when seeking medical treatment and when informing his superiors of his injury. Moreover, the record indicates claimant did not give notice of a September 4, 2004 accident.

When claimant first sought treatment from the ER, he disclosed only a shoulder injury and there is no documentation about his history of injury contained within the record. When he called his superiors at the company, they indicate he only advised them of the injury occurring in Chicago, Illinois, and made no mention of the accident on September 4, 2004 in Hiawatha, Kansas. In fact, claimant has no clear recollection of what he told these gentlemen, although he admits generally disclosing the event in Chicago, Illinois. When he presented for further treatment with Dr. Teter on September 8, 2004, he referenced an accident on August 27, not August 30 or September 4, 2004. When claimant saw Dr. Stacey he apparently disclosed an accident date, but Dr. Stacey's report reveals October 7, 2004 as the accident date, and reports that claimant *denied* any other prior symptoms, injuries or accidents similar to those he was presently complaining of.

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Here, both parties agree claimant advised respondent of an August 30, 2004 accident in Chicago. Both of respondent's representatives deny any notice about a September 4, 2004 accident, and claimant has no clear recollection about what he told his supervisors about that alleged accident. Until the time they were

contacted by Ms. Shopteese, respondent believed claimant's physical problems were attributable to the August 30, 2004 accident in Chicago. It had no reason to suspect anything was amiss. Based upon this testimony, the Board finds that claimant failed to provide the statutorily required notice for the September 4, 2004 accident. Accordingly, the Board must reverse the ALJ's preliminary hearing Order.<sup>1</sup>

At the June 8, 2005, preliminary hearing, claimant introduced a copy of the letter that Ms. Shopteese wrote to respondent in mid-September 2004. The document, which is marked as claimant's exhibit 1, displays a September 16, 2004, date from a fax machine. That letter indicates Ms. Shopteese contacted respondent on September 15, 2004, with information about claimant and his plan to collect money for an injury that he was going to claim occurred in Chicago. Moreover, the letter states that claimant fell from the top step of his truck when he arrived at her home and afterwards stated his shoulder and arm hurt.

On 9/15 I (Doris Shopteese) Francis Levret's fiancé[e], called Stan of MXI. In regards to Francis's safety.

. . . .

The day Francis [claimant] arrived home Francis yelled my name stating he missed his baby. He began to shake his ass from side to side when suddenly he slipped & fell from the top step of the truck. He rolled & almost bumped his head on my car.<sup>2</sup>

With that new evidence, Judge Benedict ruled in the June 10, 2005, Order that respondent had timely notice of the alleged September 2004 accident. The Board agrees. Excluding weekends and the Labor Day holiday, which are not counted, the telephone call and letter from Ms. Shopteese in September 2004 to respondent provided respondent with notice of claimant's alleged September 4, 2004, accident within 10 days of when it occurred. Accordingly, K.S.A. 44-520 is satisfied.

Nonetheless, claimant has failed to prove it is more probably true than not that he injured his right arm or shoulder on September 4, 2004, when he allegedly fell from the steps of his truck.

As indicated in the Board's first Order, claimant failed to advise respondent of the alleged September 4, 2004, fall when he spoke with respondent on September 7, 2004. The Board also found in its first Order that Dr. Teter saw claimant on September 8, 2004,

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<sup>1</sup> *Levret v. MXI Express, Inc.*, No. 1,019,920, 2005 WL 1046572 (Kan. WCAB Apr. 28, 2005).

<sup>2</sup> P.H. Trans. (June 8, 2005), Cl. Ex. 1 at 1, 2.

and the doctor's office notes indicated claimant's shoulder injury occurred on August 27, 2004. In addition, those same notes do not mention the alleged September 4, 2004, fall. Moreover, at the June 8, 2005, preliminary hearing, respondent introduced a copy of the emergency room report prepared as a result of claimant's September 4, 2004, visit. That report, likewise, mentions an August 27, 2004, accident and, likewise, fails to mention a September 4, 2004, fall.

59-year-old male presents complaining of severe right arm pain. Slipped and fell alternating his truck, work-related. Fell backwards and hyperextended or twisted his right arm. Felt and heard a sharp pop in the midportion of the right upper arm. Now states he is unable to use or move the right upper arm. No prior history of similar problem. Has not used any medications for this. Injury took place on August 27. This is the first evaluation for this injury. . . .<sup>3</sup>

In the first preliminary hearing Order, the Judge commented that "[c]laimant's own words are so conflicting as to cast doubt upon his credibility."<sup>4</sup> And in the June 10, 2005, Order, the Judge stated "[t]he Court does not find that either witness to the September 4 accident – the Claimant and Ms. Shopteese – to be credible."<sup>5</sup> Similarly, at this juncture of the claim the Board is not persuaded that claimant fell on September 4, 2004, or that he sustained personal injury due to an accident that occurred in Kansas that arose out of and in the course of his employment with respondent. Accordingly, the June 10, 2005, preliminary hearing Order should be reversed.

As provided by the Workers Compensation Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.<sup>6</sup>

**WHEREFORE**, the Board reverses the June 10, 2005, Order and denies claimant's request for benefits.

**IT IS SO ORDERED.**

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<sup>3</sup> *Id.*, Resp. Ex. A at 1.

<sup>4</sup> ALJ Order (Jan. 31, 2005) at 1.

<sup>5</sup> ALJ Order (June 10, 2005) at 1.

<sup>6</sup> K.S.A. 44-534a(a)(2).

Dated this \_\_\_\_ day of August, 2005.

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BOARD MEMBER

- c:     Bruce Alan Brumley, Attorney for Claimant  
       Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier  
       Bryce D. Benedict, Administrative Law Judge  
       Paula S. Greathouse, Workers Compensation Director